



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206, 211, and 213

[Docket DARS-2018-0052]

RIN 0750-AJ50

Defense Federal Acquisition Regulation Supplement: Brand Name or Equal (DFARS Case 2017-D040)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that requires the use of brand name or equivalent descriptions or proprietary specifications or standards in solicitations to be justified and approved.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017-D040, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>.

Search for "DFARS Case 2017-D040." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2017-D040" on any attached documents.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2017-D040 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 888(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Section 888(a) requires that competition on DoD contracts not be limited through the use of brand name or equivalent descriptions, or

proprietary specifications or standards, in solicitations, unless a justification for such specification is provided and approved in accordance with 10 U.S.C. 2304(f). The requirements of 10 U.S.C. 2304(f) are implemented in Federal Acquisition Regulation (FAR) sections 6.303 and 6.304, which address the content, format, and approval authorities for justifications for other than full and open competition.

II. Discussion and Analysis

Currently, FAR 6.302-1(c)(2) states that brand name or equal descriptions, and other purchase descriptions that permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use. This rule proposes to amend DFARS 206.302-1 to add a new paragraph (c)(2) to advise contracting officers that, notwithstanding FAR 6.302-1(c)(2), a justification and approval described at FAR 6.303 is required when using brand name or equal descriptions. A new paragraph (S-70) is also added to provide a similar instruction for proprietary specifications or standards.

FAR subpart 13.5 provides simplified procedures for certain commercial items. FAR 13.501(a) requires a justification and approval for sole source (including brand name) acquisitions. The content and approval requirements for these justifications

are similar to those required under FAR 6.303, but cite to a different authority. This rule proposes to amend DFARS 213.501 to advise contracting officers that a justification and approval for brand name or equal descriptions or proprietary specifications or standards is required when using FAR subpart 13.5 simplified procedures for the acquisition of certain commercial items.

In addition, FAR section 11.104 addresses requirements for the use of brand name or equal purchase descriptions. As such, this rule proposes to add DFARS section 211.104 to direct contracting officers to the new requirements at 206.302-1 and 213.501 to complete a justification and approval prior to using brand name or equal purchase descriptions. Similar direction for use of proprietary specifications and standards is also provided in new DFARS section 211.170.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new DFARS clauses or amend any existing DFARS clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select

regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not anticipated to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule is only implementing changes to internal Government procedures. However, an initial regulatory flexibility analysis (IRFA) has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 888(a) of the

National Defense Authorization Act for Fiscal Year 2017. Section 888(a) requires that competition in DoD contracts not be limited through the use of brand name or equivalent descriptions, or proprietary specifications or standards, in solicitations unless a justification for such specification is provided and approved in accordance with 10 U.S.C. 2304(f).

The objective of this proposed rule is to ensure that contracting officers execute a justification and approval in accordance with FAR 6.302-1 when including brand name or equal descriptions, or proprietary specifications or standards in a solicitation.

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The Federal Procurement Data System (FPDS) does not collect data on contracts awarded using brand name or equal descriptions or contracts that were competed and included proprietary specifications or standards. Currently, brand name or equal descriptions are procured through competitive procedures, but FPDS does not identify the subset of contracts that were awarded competitively using such descriptions.

FPDS can provide the number of offers received in response to a solicitation. This subset can help DoD better identify the number of competitive requirements that may have used such

descriptions, specifications, or standards, but only received one offer for various reasons. According to FPDS, there were 127,536 contracts and orders competed and awarded in FY 2017 that only received one offer. Of the 127,536 new awards, 76,179 (60%) of these actions were awarded to 9,823 unique small business entities. The proposed rule applies to all entities who do business with the Federal Government and is not expected to have a significant impact on these entities, regardless of business size.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The proposed rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2017-D040), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 206, 211, and 213

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 206, 211, and 213 are proposed to be amended as follows:

1. The authority citation for 48 CF parts 206, 211, and 213 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 206—COMPETITION REQUIREMENTS

2. In section 206.302-1, paragraph (c) is added to read as follows:

206.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

* * * * *

(c) Application for brand-name descriptions. (2)

Notwithstanding FAR 6.302-1(c)(2), in accordance with section 888(a) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the justification and approval addressed

in FAR 6.303 is required in order to use brand name or equal descriptions.

(S-70) Application for proprietary specifications or standards. In accordance with section 888(a) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the justification and approval addressed in FAR 6.303 is required in order to use proprietary specifications and standards.

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PART 211—DESCRIBING AGENCY NEEDS

3. Section 211.104 is added to subpart 211.1 to read as follows:

211.104 Use of brand name or equal purchase descriptions.

A justification and approval is required to use brand name or equal purchase descriptions.

(1) See 206.302-1(c)(2) for justification requirements when using sealed bidding or negotiated acquisition procedures.

(2) See 213.501(a)(ii) for justification requirement when using simplified procedures for certain commercial items.

4. Section 211.170 is added to subpart 211.1 to read as follows:

211.170 Use of proprietary specifications or standards.

A justification and approval is required to use proprietary specifications and standards.

(1) See 206.302-1(S-70) for justification requirements when using sealed bidding or negotiated acquisition procedures.

(2) See 213.501(a)(ii) for justification requirements when using simplified procedures for certain commercial items.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

5. Section 213.501 is amended by-

a. Designating paragraph (a) as paragraph (i); and

b. Adding new paragraph (ii) to read as follows:

213.501 Special documentation requirements.

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(ii) In accordance with section 888(a) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the justification and approval addressed in FAR 13.501(a) is required in order to use brand name or equal descriptions or proprietary specifications and standards.

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